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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1920

No. 226

JOHN HORSTMANN COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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Statement of the Case.

This suit was filed in the Court of Claims, January 6, 1913, by the John Horstmann Company, the owners of certain lands in Churchill County, Nevada, surrounding and including a lake known as Little Soda Lake (R. 8, Finding of Fact I).

Prior to and during the year 1906 the said lake and lands surrounding it were in the actual posses-

sion of the appellant and its predecessors, who were manufacturing soda from the waters of said lake which was valuable and was being marketed by it. The original plant for the recovery of the mineral contents of the waters of Little Soda Lake had been constructed many years prior to its acquisition by the appellant, had been improved and enlarged by it and was in full operation up to and in the year 1906. Little Soda Lake is most of the time a dry lake bed, with here and there the mineralized water standing in pools, and which was pumped therefrom by the appellant's employes into earth vats, constructed by it along the edge of the lake, to be evaporated therein in the manufacture of soda (R. 8, Finding of Fact II).

Little Soda Lake is situated in the Carson Sink Valley, a depression in the earth's surface covering many thousands of acres and during a past geologic age was the bottom of an inland sea, now called Lake Lahontan, but in fact prior to the year 1906 was an arid area.

The slope of the depression is northeasterly and the grade about ten feet to the mile. The original bed of Lake Lahontan where was the so-called Little Soda Lake, has been covered by the elements since the dessication of Lake Lahontan by deposits of sand, clay, silt, cinders and other forms of disintegrated rock substance, and fissures and cracks exist throughout the mass, and which are not uniform; and this mass being the earthen bottom and sides of

the so-called lake and of the surrounding lands of the appellant which have been submerged.

The lowest depressions on the earth's surface within this area are the Little Soda Lake and the Big Soda Lake and the Carson River, and prior to 1907 the surface of Little Soda Lake was about 3935 feet above sea level and that of the Carson River about 4,000 feet, and within two miles or less of the lake (R. 8 & 9, Finding of Fact III).

Little Soda Lake's only known source of water supply, prior to 1906, were small springs which seeped into the lake from its bottom and sides, and these springs were supplied by seepage from the Carson River (R. 9, Finding of Fact IV), the bottom of the lake being not only below the level of the adjoining water table, but sixty-five (65) feet below the surface of the adjoining Carson River and the seasonal rainfall at this point averaging but four (4) inches and being practically negligible as a source of ground or lake water replenishment (R. 9, Finding of Fact V) and this being in an arid country where the yearly evaporation is many times in feet this evaporation in inches.

From prior to the year 1867 to 1906 the level of Little Soda Lake had not varied more than two (2) feet (R. 9, Finding of Fact VI) and until after the United States Reclamation Service had constructed what is known as the Truckee-Carson Project.

The Truckee-Carson Project consisted of canals, dams and other structures, whereby large quantities

of surface and other waters theretofore confined to the watershed of the Truckee River, and to the adjoining State of California, and separated from the watershed of the Carson River by hills and highlands, were transported to the watershed of the Carson River (R. 9, Finding of Fact VII) and to the Carson River, the only theretofore known source of water supply of Little Soda Lake.

In 1906 and during each year since then this Truckee-Carson Project, which was a national irrigation project, has brought over from the Truckee River watershed large quantities of water that otherwise would not have been there, and passed the same through many units thereof, among them being the canals known as the T line Canal, U line Canal and the N line Canal (R. 9, Finding of Fact VII) and all of which canals virtually surround Little Soda Lake, within two (2) miles thereof, and one of which being between the lake and the Carson River, and the altitude of the canals being one hundred feet higher than the surface of the lake and about forty feet higher than that of the Carson River (R. 9 & 10, Finding of Fact VII). Large amounts of water passed through all of these canals from April to September, inclusive, and large quantities of water were stored at the Lahontan Dam during every month of each year (R. 10, Finding of Fact VIII), and the surplus water from this dam passed into the Carson River and augmented the volume thereof, there being no other outlet from the Lahontan Dam other than the canals and the Carson River.

While from prior to 1867 to 1906 the level of Little Soda Lake remained within two (2) feet (R. 9, Finding of Fact VI), with the advent of the Truckee-Carson Project the volume of water in Little Soda Lake has continually increased and the level of the lake's surface has risen about nineteen (19) vertical feet since the project was opened up; the recovery of minerals, such as soda, from the waters of the lake is no longer possible; the machinery, vats, houses and other improvements which constituted the manufacturing plant of the appellant have been permanently flooded, and the lands of the appellant immediately surrounding Little Soda Lake have been permanently inundated, and the value of the property of the appellant has been destroyed (R. 10, Finding of Fact VIII).

While the level of the lake varied within two (2) feet from before 1867 to 1906, with irrigation of 14,000 acres within the scope of this project (Finding of Fact VI) immediately upon the operation of the Truckee-Carson Project and the bringing into the watershed of the Carson River the waters of the Truckee watershed, the level of the lake commenced to rise rapidly and with the increase twofold of the lands theretofore under irrigation, the water in the lake has risen vertically nineteen (19) feet and entirely submerged the property of the appellant (R. 10, Finding of Fact IX).

The canals ramify an area close to 100,000 acres, in 1906 irrigated 40,000 acres and no negligence is

alleged or proven in the construction or operation of the project, and the value of the property destroyed has been found to be $9,000.00 (R. 10, Finding of Fact IX, X, XI).

The Court of Claims held as a conclusion of law that upon the facts found the appellant was not entitled to recover and rendered judgment in favor of the United States.

Assignments of Errors.

The Court of Claims erred:

First. In holding there was not a taking of the appellant's property within the meaning of the constitutional provision.

Second. In rendering judgment against the appellant and in favor of the United States, and

Third. In failing to render judgment in favor of this appellant.

Argument.

PROPOSITIONS.

This case will be considered under the following general propositions:

1. **There was a taking of the appellant's lands within the meaning of the Constitution.**

That there was a taking within the meaning of the Fifth Amendment to the Constitution appears

from the findings of fact, which will be considered specifically later on.

The decision of the lower court is based upon the decisions of this court in the cases of Bedford v. U. S., 192 U. S. 217, Jackson v. U. S., 230 U. S. 1, and Kansas v. Colorado, 206 U. S. 46, and the case of the Natron Soda Co. v. U. S., 54 C. Cls. 169.

Both the Bedford and the Jackson cases involved the rights of riparian owners, who sought to recover for damages to the property caused by the government improving a navigable stream on which they were located and in subordination and subservience to which right of the government the properties involved admittedly were.

But it is a far different matter when the government, as in the case at bar is not improving the harbors and rivers but is building an irrigation system over private and public lands. This, we believe, is a point which should not be lost sight of, as in the cases above cited the government bases its rights to do the acts involved on that power. This distinction is recognized by Judge Morrow in Cohen v. United States, 162 Fed. 364. On page 368 he said:

> "The present case is distinguished from the foregoing cases in the fact that Sausal Creek is not a navigable stream and the construction of the canal by the government was not for the benefit or improvement of that stream, but for the improvement of navigable waters in another and different locality, and it is claimed by the petitioner that the injury she suffered was the taking of her private property (the waters of

> Sausal Creek) for a public use, and that for the taking she is entitled to just compensation. This distinction between acts of the government damaging private property on a navigable stream in the work of improving its navigability and the taking of private property connected with an unnavigable stream for public use in improving navigable waters elsewhere was recognized when the court disposed of the demurrer to the complaint."

But aside from this distinction the acts of the government in both the Gibson and Bedford cases are materially different from the cases of United States v. Lynah, 188 U. S. 445; Williams v. United States, 104 Fed. 50, and Heyward v. United States, 46 Ct. Cl. 484, and the case at bar. The clearest exposition of the difference between the present case and the Gibson case is to be found in the opinion of Mr. Chief Justice Fuller in that case, wherein on page 276 he says:

> "In those cases (referring to the Lynah and other like cases) it was held that permanent flooding of private property may be regarded as a 'taking'. In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

It should be noted that in the Bedford case existing conditions were not changed, as they were in this case, and which was or should be stronger than all of the cases that have heretofore been heard in

this court, where lands have been flooded, and where the lands were either themselves on a navigable stream, or a navigable stream was being improved and the lands were on another stream. But in the present case the question of improving a navigable stream is not involved. Neither the Carson nor the Truckee Rivers were being improved for navigation or are navigable streams in fact. The work being prosecuted was a reclamation project.

In the present case there is a taking as fully as in the Lynah case, i. e., the land is completely submerged and destroyed for all purposes for which it can be used. In the Gibson case what was done to the petitioner's land? Nothing whatever. No water, soil or other substance was placed thereon either temporarily or permanently. The only damage was for the loss or inconvenience suffered by petitioner by the erection of an improvement in the navigable waters (which the government had a perfect right to make), by which it was made more difficult for the owner of the land to gain access to and from the same by its waterfront.

In the Bedford case the government's acts were of the character that every riparian owner has the legal right to perform, i. e., to protect his own lands from overflow by the building of revetments, or other structures to prevent the overflow.

The case of Jackson v. United States, 230 U. S. 1, is likewise a case involving riparian rights and subservience thereto of the private owners to

the rights of the government to improve the navigability of a navigable river.

With reference to the quotation and citation of the case of Kansas v. Colorado, 206 U. S. 46, at page 170 thereof, it would seem that certain language in this case is sought to show that "percolating waters are hidden and invisible" and which is doubtless often the fact with waters, the percolating waters in this case were doubtless invisible while they were percolating through the lands but they were atrociously evident at a later period when they submerged and occupied the property of this appellant.

When in the early stages of this case a demurrer was filed therein by the government that *scienter* must be alleged and proven (48 C. Cls. 423) Mr. Justice Barney, in overruling the demurrer said:

Upon the oral argument in this court the defendant's counsel admitted that the facts as alleged state a cause of action within the case of Lynah v. United States (188 U. S. 445) except that it was contended that, as the injuries complained of were not open, visible and notorious there should have been an allegation and proof that the destruction resulting from the water conveyed in said canals and ditches was reasonable to have been anticipated.

> "It appears to the court that counsel makes the mistake of confounding the taking of property with the means by which it is taken. The taking may be by the action of causes which were not anticipated; it may not have been intended or contemplated, but after the cause has acted and the unexpected taking has been ac-

complished, it is open, notorious and visible as though it was the result of intention. * * *

" * * * in suits against the government for the taking of property under the fifth amendment to the Constitution the question is whether the property has been taken or not and not *how* it has been taken. If land has been submerged by water flowing or seeping under the surface of the ground, it has been taken just as effectually as though it had been submerged by water flowing above the surface. Whether the damage caused by a flying missile is direct or consequential does not depend upon whether it passed unseen in the night or in broad daylight. It would be a travesty upon justice for the government to effectually take property from one of its citizens and then plead the small boy's defense, 'that it didn't mean to'.

"The Supreme Court said in Lynah v. United States, supra, 'It is clear from these authorities that when the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the fifth amendment.' (Ibed, 470) There is nothing said as to *how* this flooding is to be done or as to whether it is to be intentional or not. In fact, in that case a portion of the flooding was caused by percolation and a portion by flowage upon the surface, and no distinction was made between the two methods of taking."

The case of United States v. Williams, 188 U. S. 445, was also one where the government had the right to improve navigation.

In the case of United States v. Heyward, affirmed by this court at the last term by a divided court it was also one involving the improving of navigation,

a riparian owner and where the government had superior rights.

But in the cases United States v. Cress, 243 U. S. 316, and the Kelly case, decided at the same time, we have a case not even as strong as the one now under consideration. In those cases the improvement of a navigable river was involved, though the claimants were not riparian owners on the river improved. But in the present case, there is no question of improving navigation. It is a question of supplying irrigation facilities, and while the government has the right to construct and operate the project, it is the duty of the government to pay for the land taken thereby.

In United States v. Cress, supra, at page 321, Mr. Justice Pitney says:

> " * * * the test of navigability is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures, that the public right is to be measured by the capacity of the stream in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

Idem, page 326:

> "In United States v. Lynah, 188 U. S. 145, the same principle was applied in the case of operation by the Government of the United States * * * The raising of the water

above its natural level was held to be an invasion of the private property thereby flowed."

Now, the water level of the river is the height of the river, and the water level of the land is the ground water level, which the government in the present case admits raising.

Now, a further principle upon which the action in this case was dismissed by the lower court upon final hearing, and after Mr. Justice Barney had retired from the bench, was that the government would not be liable for an action which resulted in the submersion and destruction of the property involved, if a private party could not be held liable for the same act, and that the owner of lands had the absolute right to irrigate his lands and bring water therefor from away, and which but for such bringing would not be there, and that the lower proprietor is subservient to the seepage from additional water brought from afar for irrigation purposes.

The proposition that a private party would not be liable in this case is not the law in the arid states where irrigation is mostly practiced or where the irrigation was carried on in this case.

It was said in Boynton v. Longley, 19 Nev. 73:

"In a dry and arid climate where irrigation is necessary in order to cultivate the soil the question as to the rights of proprietors of upper and lower lands in regard to the waste water has seldom arisen, because, as a general rule, the lower land owner is willing to receive, dispose

of, profit by the use of all water flowing from the upper lands of another in irrigating his own land. It is seldom that any landowner in this State has occasion to complain of too much water. The cry is, usually, not for less but for more.

"As to the flow of water caused by the fall of rain, the melting of snow, or natural drainage of the ground, the prevailing doctrine is that when two tracts of land are adjacent and one is lower than the other, the owner of the upper tract has an easement in the lower tract to the extent of the water naturally flowing from the upper to and upon the lower tract and that any damage that may be occasioned to the lower land is *damnum absque injuria.*

"The rule above stated applies only to waters which flow naturally from the causes stated. Courts have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man."

Wiel on Water Rights, 3d. E., p. 492:

"He is responsible to the plaintiffs only by injury caused by his negligence, or those *wilfully* inflicted in the exercise of his right of irrigating his land."

Wiel on Water Rights, p. 492:

"Only *vis major* will dissolve from breach of contract, however, as distinguished from tort." (We have here an implied contract.)

Boynton v. Longley, 19 Nev. 73.

Opinion of Hawley, J.:

"Water seeks its level and naturally flows from a higher to a lower plane; hence the lower surface, or inferior heritage, is doomed by

nature to bear a servitude to the higher surface, or superior heritage, in this, that it must receive the water that naturally falls on and flows from the latter. The proprietors of the lower land cannot complain of this, for *aqua currit et debet currere ut solebat*. But this rule—this expression of the law—only applies to waters which flow naturally from springs, from storms of rain or snow, or the natural moisture of the land. Whenever courts have had occasion to discuss this question they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man (See authorities cited in the briefs of counsel)."

The opinion then goes on to quote Wash. on Easements, 450, and says:

"The latter cannot by artificial trenches or otherwise cause the natural mode of its (water on his land) being discharged to be changed to the injury of the lower field, as by conducting it by new channels, in unusual quantities on to particular parts of the lower field."

Hawley, J., Idem, p. 74:

"In the case under consideration the facts are different from any of the decided cases. Here both the parties are farmers, engaged in the ordinary cultivation of their respective lands by artificial irrigation. To conduct and carry on this business profitably, it is absolutely necessary to bring water from points where it can be obtained, remote and distant from their lands. Without the reasonable use of this water their lands would be comparatively worthless. The law should not be construed so as to deny or materially abridge the rights of either party to prosecute his agricultural pursuits, or deprive him of any of the incidents necessary to culti-

vate and improve his lands. We are of the opinion that the upper landowner while having the undoubted right to make a reasonable use of the water for irrigation, must so use, manage and control it, as not to injure his neighbor's lands. *Sic utere tuo ut alienum non leadas.* He should not be permitted to make his estate more valuable by an act which renders the estate of the owner of the lower lands less valuable. The general doctrine is derived from the civil law; it is in harmony with the rules established by a majority of the decided cases having any analogy to the case at bar, and it is, in our opinion, founded upon substantial reasons of justice and equity."

Shields v. Orr Ditch Co., 23 Nev. 355:

"The owner of an irrigating ditch is bound to keep it in good repair and is liable for damage caused by seepage of water from it."

Idem:

"A person owning a ditch from which water escapes upon the premises of an adjoining landowner cannot escape liability on the ground that such landowner might, at a small expense, have prevented any damage by digging a ditch on his own land that would have carried off the waste water." (Showing liability for seepage from ditches.)

Parker v. Larsen, 86 Calif. 236:

"The rule applicable to the percolation of water from a natural water course does not apply to water brought upon the land by artificial means; but in such case the rule applies, that where one brings a foreign substance on his land he must take care of it, and not permit it to injure his neighbor, and is subject to the maxim *sic utere tuo ut alienum non laedas.*

Wilson v. New Bedford, 108 Mass. 264.

Chapman, Ch. J.:

"The petitioner alleges that this reservoir has caused damage to him by reason of the percolation of water from the reservoir, underground to his house and cellar and barn cellar, about a thousand feet distant from the dam, and alongside of it, and preventing the natural passage of water underground into the natural stream on which the dam is constructed.

"The respondents have so raised their dam and reservoir as to cause an artificial pressure of the water through the soil, and by its action it has flooded the petitioner's cellars. Probably it can not be ascertained precisely how it acts underground.." * * * "In Monson v. Brimfield Manf. Co. vs. Fuller, 15 Pick. 554, it was decided that damage occasioned by the percolation of water through the earth from the pond to neighboring uplands and causing them to produce poorer grass or a smaller quantity of grass, could be recovered * * * The principle is just; for the water often injures land which it never overflows; and where the soil is porous the water may by percolation render a dwelling house uninhabitable, or destroy the value of large tracts of land. * * *

"We think the petitioner's claim is not only sustained by authority but founded on justice. He ought to be compensated for such an injury as the petition describes, and the law would be defective if it failed to give him a remedy."

Pixley v. Clark, 35 N. Y. 520.

Peckham, J.:

"It was proved on the trial that the embankment was well made, and no signs of wet on its outside appeared. From these facts the judge held the water must have gone through the nat-

ural earth in the creek into this land, and not through the embankment, or between it and the natural soil, and non-suited the plaintiff. On appeal that nonsuit was sustained by the General Term in the Fifth District, and the plaintiffs appealed to this court.

"The single question presented on these facts is whether the defendant had a right to 'drown' the plaintiff's sixteen acres of land by pressing the water through the natural banks of the stream, or otherwise. If he had, the nonsuit was right—if not—it was erroneous. * * *

"The defendant's counsel says that the defendant had the right to build the dam to use this waterpower, 'and all that can be legally required of them is that they shall exercise it so as not to injure, directly of unnecessarily, the lands of their neighbor'; also he says that 'if one do a lawful act on his own premises, he cannot be held for the injurious consequences, unless it was so done as to constitute actionable negligence.' These, like many general propositions, are plausible, but, as applied to this case, in the sense they are sought to be used, neither of them is law, and never was. Take the first: Is any such principle found in any case, or stated by any elementary writer, as that you have a right to use your water power, and build a dam for that purpose, and, if necessary to that end, you may flow and drown your neighbor's land provided you do not do so 'unnecessarily.' That you may do it so far as is necessary to the full and profitable enjoyment of your waterpower, even though you flow and destroy his farm.

"The other proposition is very similar. Was it ever held or pretended that you might build a dam, and flow another's land, provided you were guilty of no want of care or skill in its construction? In fact, the better dam you

make, the more water you restrain and throw back—the greater the damage to the adjoining landowner. These are sound maxims applied to many cases, but not to all. The latter may be admitted and applied here. The act of the defendants was lawful in building their dam, so long as they did not injure their neighbor's land. The moment they so interfered by their dam as to flow his land to his injury, the act was unlawful. Did any declaration aver that the defendant, in building his dam 'unnecessarily' threw the water into plaintiff's land, or that he did so by carelessly or negligently constructing his dam. No such precedent can be found. The complaint in this case contains no such allegation. * * *

"Again the defendants insist that the laws of surface streams do not apply to water circulating or percolating through the natural soil under the surface of the earth. The nonsuit was placed on this ground. No one disputes this, as an abstract proposition. But that does not aid the defendants. They must show that the rule applies the other way—that is, that the rules applicable to subterranean water apply also to living surface streams. That they will fail to establish."

Page 529, Idem:

"Surely, if you cannot subtract or divert the water of a surface stream to the injury of a riparian owner, even by percolation caused by a well on your land, you will be liable to your neighbor for your direct interference with a surface stream, whereby he is injured by percolation you have yourself unlawfully created. In Cooper v. Barber (3 Taunt), the plaintiff had diverted the water of a surface stream by penstocks, to irrigate his land; by means thereof, he injured the defendant's land

through the consequent percolation of water under the soil so as to overflow his kitchen and cellar. The defendant broke down one penstock and removed the upper boards of another, and his house became directly dry. In an action by plaintiff for destroying the penstocks, the court held the action would not lie for that part of the injury to the penstocks necessary to abate the nuisance.

"The principle which exempts a party from liability for digging upon and cultivating his own land as he pleases, though he may interfere with subterranean water is designed for the benefit and protection of the landowner. As sought to be applied here it would work to his great injury. Landowners, under this rule, in the neighborhood of surface streams, could never know their rights or the value of their lands. They would be subject to the superior rights of millowners to damage the land for their benefit, without compensation.

"The case then stands thus. The defendants are sued for drowning the plaintiff's land by an unauthorized interference with a surface stream by pressing a part of that stream through its banks, by means of their artificial works, into the lands of the plaintiff to his injury. The defendant's answer, true, we did that for our benefit, but the law allows a party to interfere with underground, dead or percolating water, by sinking a well or digging drains on his land. The reply is, you have interfered with a surface stream, not with underground, percolating water, and hence the doctrine of those cases affords you no protection. The point is, that the defendants, by their interference with a surface stream have wrongfully pressed a part of it into percolating water, and thus drowned the plaintiff's land. When sued upon for this interference with a living, sur-

face stream, they answer that they are not liable for interfering with water percolating under the earth. They insist upon defending themselves against something for which they are not prosecuted. To hold that defendants would be liable, if their interference with the surface stream had damaged the plaintiff by overflowing the natural banks and pressing it through the artificial embankments, but not if they pressed it through the natural banks, would be about as sound legal justice to my mind, as if we should hold a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability.

"Defendants also insist they are not liable because it is not known how the injury occurred—that the principle is not understood. It is clear in this, as in the case of Cooper vs. Barber (3 Taunt. 99), and upon like proof, that this dam has, in fact, caused the injury, though we may fail to discover the principle upon which it was done. The learned judge there called it a mere pretense to contend otherwise as to the fact. The defendant, then, is as much answerable for it as one would be who choked another to death, though it should be proved that science was utterly unable to declare how life should entirely leave the body by mere pressure upon the throat for a couple of minutes. These defendants tried an experiment for their own benefit, and found it seriously injured the plaintiff. When they see the injury they insist upon continuing it. They add that the plaintiff can protect himself, if he will appropriate a part of his land to a ditch, and will incur the expense of digging the ditch and keeping it in repair for their benefit. This shocks the sense of honesty and justice. To

look after the mysteries that attend the circulation of subterranean water, not caused by interfering with a surface stream, is to seek darkness rather than light. There is no mystery as to the cause of this damage.

"It is a familiar rule that the pressure of water is in proportion to its height. The water was raised much higher than in its natural condition, and its natural banks, by this dam, and it is entirely clear that it was pressed into this land, either through the natural or artificial banks, or else between them. That was the position assumed at the circuit; when the water from the dam was drawn off, the water left this land. It is, therefore, not that the defendants have unreasonably, negligently, unintentionally, unnecessarily or unexpectedly flowed the plaintiff's land, to his injury, for their benefit, that they are liable. It is simply because they have done it in fact; they have done it by their works, and it cannot be charged to extraordinary floods. In the language of the old books, 'the defendants *exaltavunt stagnum* by which the plaintiff's meadow was flooded and they are liable therefor' (Godbolt, 58). The necessity, motive, knowledge or care of defendants forms no element of this action. Not the peculiar mode or manner of the injury, but the fact of the injury caused by the dam, in any mode or manner, is the ground of the action. Landowners have purchased their farms where a surface stream runs, in view of the conceded right to have that stream continue as it had been accustomed to run. If its current be interfered with in any manner, to the damage of land, an action lies. An owner may dig upon and cultivate his own land at his pleasure, though he cut off or open water circulating or dead under the earth to his neighbor's injury. Such water is not different from the earth itself.

He owns it. He does not own the water of a surface stream, and cannot set it back to another's injury without liability."

Reed v. State, 108 N. Y. 407. Ruger, Ch. J., cites Pixley v. Clark, supra, and says, p. 414:

"It does not at all follow from the right that a landowner has, of lawfully digging on his own land for his own use, even though he thereby interrupts a subterranean current which feeds his neighbor's well or spring, that he has also a right to divert running water into an underground channel and thereby flood his neighbor's lands."

Carrington v. Brooks, 121 Ga. 253. Evans, J.:

"The substance of the court's instruction was, that although the dam may have remained unchanged in height for twenty years, yet, if during that time, by reason of a change in using the water, it caused the filling up of the bed of the stream with sand, injuring and damaging the plaintiff's land by percolation and seepage of the water, this was an invasion of his land and he had the right to recover for any injury that occurred to him within four years preceding the bringing of the action."

Farnham, The Laws of Waters and Water Rights, Vol. 3, page 2800, note:

"The owner of premises damaged by seepage of water from an irrigating ditch is entitled to an injunction restraining a repetition thereof for the vindication and preservation of his right."

Idem, Vol. 2, p. 1769, Sec. 549:

"The level of water standing in .the soil will usually correspond quite closely to that of

the water flowing in the stream, so that anything which raises the height of the latter will prevent the water in the soil from finding its way into the stream and will render the land adjoining the stream wet and unfit for cultivation. And any act of the lower owner which will tend to cause such a condition is a wrong to the upper owner and he is entitled to maintain an action to protect his right."

Idem, Vol. 2, p. 1770:

"The permanent maintenance of the water of a navigable lake at a height above high-water mark constitutes a taking of the property of the adjoining owners which entitles them to compensation."

Idem, p. 2153:

"In time, if the courts are as active in establishing new rules governing subterranean waters within the next few years, which rules have but kept pace with the scientific investigations upon the subject, this class of subterranean waters (percolating) will pass from the class of those flowing in unknown courses to those flowing in known courses, and the 'secret incomprehensible influences' and 'practical uncertainties' will become comprehensible influences and practical certainties" (Citing cases).

North Point C. O. Co. v. Utah & S. L. C. Co., 16 Utah, 246. Zane, Ch. J., p. 266:

"But the Canal Company defendants claim that the seepage and surplus water from the lands irrigated by them flows naturally into White Lake, a part of the Surplus Canal. Undoubtedly a proprietor of higher land is entitled to the benefit of the natural flow therefrom, onto the lands of another, of surface or

other water not brought there by artificial means. But when water is brought onto the higher land by artificial means, the proprietor is not entitled to such natural flow onto the land of another, to his injury. The proprietors of higher lands have not the right to the natural flow of water brought onto their lands by artificial means. If natural forces alone bring water onto a man's land, he may allow natural forces to take it off, though it may be deposited on the land of another to his injury. Seepage from lands, caused by irrigation water, brought in canals or other artificial ditches, cannot be regarded as natural seepage or drainage. It was not brought there alone by natural laws, as water from rain, snow or springs is."

In this case the government has endeavored to limit the proximate cause to the word "adjacent". That the water must come directly from the canals or dams to the lake as through a visible pipe. The findings of fact clearly show that the Carson river was the only theretofore known or conceivable supply of water for this Little Soda Lake and it is certainly apparent that the excess of water is now caused by the Truckee Carson project; had it not been constructed the lake would not have been submerged. That the water from this project did more than take the appellant's property, does not relieve the government from paying for this taking. And the lower court, it is respectfully submitted, was in error in deciding against the appellant because they did not see the water flow when the water that had flowed was so manifest. It was the water that had flowed and which submerged the

property that is the taking; not the flowing of the water.

It is respectfully submitted that the judgment of the Court of Claims herein should be reversed, with directions to enter up judgment in favor of this appellant for the sum of $9,000, as found in Finding of Fact No. XI (R. 10).

Respectfully submitted,

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